COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

BAY STATE GAS COMPANY	)	D.T.E. 01-81

OPPOSITION OF BAY STATE GAS COMPANY
TO ATTORNEY GENERAL MOTION TO REOPEN
AND ADMIT POST-HEARING EVIDENCE

I. INTRODUCTION

On November 15, 2002, the Attorney General, an intervenor in this proceeding, submitted a "Motion to Reopen Record to Admit Post-Hearing Evidence for Good Cause" ("AG Motion"). Pursuant to the Hearing Officer's November 18, 2002 Procedural Order, Bay State Gas Company ("Bay State" or the "Company") hereby opposes the Attorney General's Motion. As discussed in greater detail in Section III, (1) the Attorney General has failed to meet the Department's standard for reopening of the record, and (2) even if allowed,[1] the Attorney General's evidence would not have a material impact on the proceeding. Therefore, the Attorney General's Motion must be denied. In support of its opposition, Bay State states the following.

II. STANDARD OF REVIEW

220 C.M.R. 1.11(8) provides that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion

and showing of good cause." In reviewing a Motion to Reopen, the Department will first consider whether the evidence a party seeks to have admitted is "new" and second will assess whether good cause exists for the reopening of the record to admit such evidence. The Department has previously found that "good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision." New England Telephone and Telegraph Company, d/b/a NYNEX, D.P.U. 96-68, at 10, citing Machise v. NET, D.P.U. 87AD-12-B, at 4-7 (1990); Boston Gas Company (Phase I), D.P.U. 88-67, at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A, at 11-12 (1986). Previous Department decisions reveal that the standard required to demonstrate good cause is a difficult one to meet. The Department has found that motions to reopen must meet the strict standard of demonstrating the existence of "extraordinary and compelling" circumstances. See, e.g., Milford Water Company, D.P.U. 92-101, at 36-37 (1992). Department precedent further provides that "[i]n determining what constitutes good cause, the Department must consider the underlying statutory and regulatory requirements….In addition, the Department must balance the public interest, the interest of the appealing party and the interests of other parties." Commonwealth Electric Company/Cambridge Electric Light Company, D.P.U. 91-234-E/94-115, at 9 (citations omitted). Finally, the Department considers the credibility of the evidence in determining whether reopening of the record is warranted.

III. THE ATTORNEY GENERAL HAS FAILED TO MEET THE STANDARD FOR REOPENING OF THE RECORD

[1] In the event the Attorney General's evidence is admitted, Bay State reserves its rights to conduct additional discovery and cross-examination of the Attorney General's witness.

In his Motion, the Attorney General asserts that both documents he seeks to admit into evidence would have a significant impact upon the decision in this case. AG Motion at 2. The first document is a November 12, 2002 article from the Wall Street Journal. Attachment 2. The second document is a Staff Report from the Federal Energy Regulatory Commission issued in August 2002.

A. The Attorney General has Failed to Establish that Extraordinary or Compelling Circumstances Exist

As noted, the standard of review applied by the Department for Motions to Reopen requires a demonstration of "extraordinary or compelling circumstances." See, e.g., Boston Gas Company (Phase I), D.P.U. 96-50-C, at 9-10; North Attleboro Gas Company, D.P.U. 94-130-B, at 2 (1995); Bay State Gas Company, D.P.U. 89-81, at 45 (1989). The Attorney General does not argue in his Motion that such circumstances exist. Nor, in fact, does it appear that this is the case. A newspaper article, even though unavailable prior to Mr. Newhard's testimony, hardly constitutes the type of evidence necessary to alter the Department's findings of fact or policy conclusions with respect to Bay State's proposed Gas Cost Incentive Mechanism ("GCIM"). The Attorney General has not asserted that Mr. Newhard possesses personal knowledge of the information contained in the article, and thus would not be in a position to validate the information. The second document, a Staff Report from the Federal Energy Regulatory Commission ("FERC"), specifies that it is an "Initial Report," that the Staff's investigation in that proceeding was ongoing at the time the report was issued, and that the Report reflects only the views of the FERC staff and had not been considered by the full Commission. See, AG Attachment I, Executive Summary, at 1. Further, the FERC Staff Report the Attorney General seeks to admit dates from August 2002. In his Motion, the Attorney General proffers no

explanation as to why his Motion is filed some three months after the Report was published and nearly four months after the submission of Reply Briefs and closing of the evidentiary record in the case. The Attorney General's suggestion that the record be reopened at this late date to enter into evidence a document that he neglected to proffer for a full three months after its issuance is untimely in the extreme. This fact alone should be sufficient to reject the Attorney General's request.

B. The AG Motion Fails to Meet the Public Interest Standard Required to Demonstrate Good Cause

The Department's balancing test for determining good cause with respect to reopening the record of a proceeding was set forth in Ruth C. Nunnally d/b/a/ L&R Enterprises, D.P.U. 92-34-A, at 2-4 (1993) ("Nunnally"). The standard articulated in Nunnally requires balancing of the public interest, the interest of the appealing party and the interests of other parties.

i. The Public Interest

In Nunnally, the Department cited the "important public interest served by promoting an expedient and final resolution" of cases. Id., at 7, citing Fall River Gas company, D.P.U. 89-199-A, at 7 (1989). "Should the Department allow parties to repeatedly delay procedures or to extend the time periods before decisions are rendered, the predictability and certainty critical to Department procedure would be seriously undermined." D.P.U. 89-AD-2, at 4.

In reviewing previous Motions to Reopen, the Department has found that where "there are no compelling or extraordinary circumstances that would require reopening the record in this case and that reopening the record would be prejudicial and create an undue burden on the Department and the other parties" to the proceeding, the motion should be denied. Boston Gas Company, D.P.U. 93-60, at 11 (1993).

ii. The Interest of the Appealing Party

The second element of the Department's analysis is the interest of the appealing party. The Attorney General availed himself of the opportunity to present evidence and question the Company's witnesses during the evidentiary phase of the proceeding. He has failed to establish that a compelling reason exists to allow him the opportunity to present additional evidence well after the close of evidentiary hearings, and well after the evidence (Attachment I) was available to the public. Thus, the Attorney General's interests are not sufficient to justify the extreme measure of reopening the record well after its closure.

iii. The Interests of Other Parties

The third element of the Department's public interest standard considers the interests of other parties. The Department has previously found "[a] party's presentation of extra-record evidence to the fact-finder long after the record has closed and after all briefs have been filed is an unacceptable tactic, potentially prejudicial to the rights of other parties even when the evidence is ultimately excluded." Berkshire Gas Company, D.P.U. 90-121, at 14 (1990), citing Boston Gas Company (Phase II), D.P.U. 88-67, at 7 (1989). As the Petitioner in this proceeding, Bay State's rights would be prejudiced by further delay of the proceeding, long after the conclusion of the evidentiary portion of the Department's investigation.

C. The Evidence the Attorney General's Proposed Evidence Should not Alter the Department's Findings if Admitted

When the Attorney General's witness, Mr. Newhard, testified in this proceeding, he opposed Bay State's proposed GCIM, in part, on the basis of his assertions that market indices could be subject to manipulation. Exh. AG-1. However, the primary thrust of Mr. Newhard's argument was that *Bay State and its affiliates* would have the ability to impact market indices.

As discussed in Bay State's Initial Brief (See, pages 21-26), Bay State fully rebutted Mr. Newhard's assertions. Moreover, when pressed to provide evidence other than his own opinion to support his conclusions, Mr. Newhard indicated that he possessed none. Nor did it appear that Mr. Newhard had attempted to gather such evidence during the appropriate time in the evidentiary phase of the proceeding. See, e.g., Tr. Vol. 3, at 260-272. As discussed in Bay State's Initial Brief, the record demonstrates that (1) neither Bay State nor its affiliates report prices to the entity that prepares market index data that would be used for the GCIM, and (2) Bay State and its affiliates do not possess market power to influence such market indices. Bay State Initial Brief, at 21-26. Nothing in the FERC Staff Report even addresses this issue. The FERC Staff Report focuses on possible manipulation of indices in the California market. It does not identify NiSource as a participant in any alleged manipulation, nor does it provide evidence of any manipulation of market indices in the New England region. Thus, the Attorney General's proposed exhibits do not demonstrate that the relevant gas cost indices have been subject to some form of manipulation at times, much less that Bay State and its affiliates could cause such manipulation. Moreover, even if the market indices applicable to Bay State's gas purchases could theoretically be subject to manipulation by third parties, that manipulation would affect Bay State's retail customers as well as those of every other gas distribution company under the present Cost Gas Adjustment Clause price, regardless of whether the GCIM is approved. Accordingly, the Attorney General's proposed evidence would not have a material impact on substantial issues in this proceeding and should be rejected.

IV. CONCLUSION

WHEREFORE, Bay State Gas Company respectfully requests that the Department of Telecommunications and Energy deny the Attorney General's Motion to Reopen the record in this proceeding and grant such other relief as appropriate.

Respectfully submitted,

BAY STATE GAS COMPANY

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